Duggan v. Davey[2] and Gilpin v. Sierra Nevada Consolidated Mining Co.[3] decisions. This accords with Mr. Ross E. Browne's definition adopted by Judge Lindley in his work on the Law of Mines,[4] to-wit: "The apex is all that portion of the terminal edge of the vein from which the vein has extension downward in the direction of its dip." No portion of BC the end edge of the vein in the Senator Stewart Fraction claim abutting against the undercutting fault can satisfy this definition.

There does not seem to be much logic or precedent for the court's statement that the extralateral sweep "must in all cases be pursued more upon the dip than the strike of the vein—more upon the downward than upon the onward course of the vein" and that "to pursue a vein in the direction of its strike at an angle of less than 45 degrees to the course thereof would clearly not be following the vein on its 'downward course,' as authorized by the statute." This language was unnecessary in view of the unquestionably sound basis for the decision previously noted above.

The vein in question was a secondary vein, the position of the primary or discovery vein not having been established by the evidence. The court, however, assumed for the purposes of this opinion that the presumption flowing from the Senator Stewart Fraction patent might be taken as sufficient, in the absence of evidence to the contrary, to establish that the end lines on the ground were the true end lines for all purposes. In view of the holding that the end edge of the vein along the fault did not constitute an apex the question as to what were the true end lines of the claim became immaterial.

W. E. C.

Trespass: Liability for Trespassing Animals.—Whether or not the liability of the owner of cattle for their trespasses is the survival of a primitive theory which visited punishment upon the thing which was the source of the injury, and held its owner responsible, without proof of moral blame, the common law of England was certainly well settled at the time of the settlement of the colonies to the effect that the owner of cattle was bound to keep them in, at his peril.[1] The influence, in the modern law, of the force of economic and social conditions could hardly find a better illustration than in the way in which this rule has been treated by courts and legislatures

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[2] (1886) 4 Dak. 110, 26 N. W. 887.

[3] (1890) 2 Idaho 696, 23 Pac. 547, 1014.

[4] Lindley on Mines (2nd ed.) § 309.

[1] Holmes, Common Law, pp. 22-24; J. H. Wigmore, 7 Harvard Law Rev. 450-2.

at various periods of development of the industrial history of California. In the first stages of that history, the pastoral and mining periods, manifestly the rule of common law of England as applied to an intensively cultivated agricultural community, was entirely unsuitable. The great judges who laid the foundations of the jurisprudence of this State, setting at naught empty formalism, avoided the intolerable injustice of requiring the herdsman to fence in his cattle, and declared that the burden of protecting his lands against the inroads of his neighbor's flocks and herds rested upon the landowner.[2]

With the lapse of a couple of decades after the American occupation, the growing of grain had, in many of the counties of the State, become a very important industry, and, at the same time, the great horticultural possibilities of the State began to be apparent. In the struggle between the mining and the agricultural interests, we may read much of the subsequent history of the State, and, as a part of that greater history, we may trace the influence of these economic changes upon the rule in respect to trespassing cattle. At first, in a very conservative way, the earlier rule was changed by a series of Statutes applicable only to particular counties.[3] In 1877, the legislature passed an act restoring the rule of the English common law with respect to certain counties, of which the County of Colusa was one.[4] Finally, in 1907, a statute was passed which made it unlawful for the possessor of any animal to permit the same to trespass upon lands of other persons where such land is planted to growing crops, and is enclosed by a substantial fence or other enclosure.[5]

In the recent case of Blevins v. Mullally,[6] the District Court of Appeal of California for the Third Appellate District, had to consider the contention that the effect of the Statute of 1907 was to repeal the earlier Statute of 1877, and, therefore, to leave unenclosed farming lands subject to the depredations of trespassing stock. There was much technical force in the argument that the legislature, by enacting a general law dealing with the specific subject of trespass by cattle, and expressly repealing all acts in conflict with such general law, had brought about this unfortunate result. But the Court, in an able opinion by Mr. Justice Hart, not attempting to meet the contention upon technical grounds, rested its decision denying

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[2] Waters v. Moss (1859) 12 Cal. 535; Logan v. Gedney (1869) 38 Cal. 579; Hahn v. Garrett (1886) 69 Cal. 146, 10 Pac. 329.

[3] The first act was that of 1872, applicable to Santa Clara County, Statutes 1871-2, p. 580. See Hahn v. Garrett (1886) 69 Cal. 146, 10 Pac. 329.

[4] Statutes, 1877-8, p. 176.

[5] Statutes, 1907, p. 999.

[6] (August, 1913) 17 Cal. App. Dec. 133.

that the law of the earlier decisions had been applied by the legislative act to the farming counties, upon the broader and more satisfactory ground that no conceivable reason could be imagined why there should have been any purpose on the part of the legislature to restore a rule that would have worked great injury to one of the State's principal industries.

T. A. J. D.

Wills: Jurisdiction of Equity to Set Aside Probate on Ground of Fraud.—The continuing litigation over the Davis Estate, which has been in the courts, both State and Federal, since 1896,[1] has called forth a decision from the United States Circuit Court of Appeals in which a number of questions of particular interest and importance are considered.[2] The suit in regard to which the recent decision is concerned was brought by heirs who in the original proceedings had unsuccessfully contested the probate of the will, for the purpose of having the probate set aside and recovering possession of the estate. Among other grounds for seeking relief, it was alleged that the will was a forgery and had been admitted to probate by means of the fraudulent placing on the jury of three co-conspirators of the proponents. In sustaining the defendant's demurrer and denying the relief prayed for, the court held that equity had no jurisdiction to set aside a will or the probate thereof on the ground of fraud.

This rule is one which has frequently been asserted. Perhaps the most important case in this country is that of Broderick's Will,[3] decided by the Supreme Court of the United States in 1874, in which it was claimed that probate had been obtained by means of a forged will and perjured testimony. The court, after reviewing the English decisions, concluded that the cases of Kerrick v. Bransby[4] and Allen v. McPherson[5] were decisive of the point, and proceeded to lay down the broad rule that "a court of equity will not entertain jurisdiction to set aside a will or the probate thereof." Though the result reached

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[1] See Estate of Davis, (1902) 136 Cal. 590, 69 Pac. 412; In re Davis, (1907) 151 Cal. 318, 86 Pac. 183, 90 Pac. 711; Tracy v. Muir, (1907) 151 Cal. 363, 90 Pac. 832.

[2] Stead v. Curtis, (May 5, 1913. Rehearing denied July 7, 1913) 205 Fed. 439. For original opinion, see 191 Fed. 529.

[3] Case of Broderick's Will, (1874) 21 Wall. 503; see also same case, State of California v. McGlynn, (1862) 20 Cal. 233.

[4] (1729) 7 B. P. C. 437.

[5] (1847) 1 H. L. C. 191.